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In the Matter of:	Docket No. FIFRA-09-2009-0013
Bug Bam Products, LLC	REPLY TO CONSOLIDATED MOTION IN OPPOSITION TO COMPLAINANT'S MOTION TO FILE FIRST AMENDED COMPLAINT AND SUPPLEMENT TO AMENDED COMPLAINT
Respondent	

Pursuant to 40 C.F.R. § 22.16(a), the United States Environmental Protection Agency, Region IX ("EPA" or "Complainant"), filed a Motion for Leave to File First Amended Complaint on November 18, 2009, as supplemented on November 19, 2009 ("Motion"). Through its Motion, Complainant seeks to (1) add a new respondent, Flash Sales, Inc. ("Flash Sales"); (2) supplements its allegations against Respondent regarding the application of the minimum risk exemption to the FIFRA registration requirements found at 40 C.F.R. § 152.25(f); and (3) increase the proposed penalty based upon the addition of Flash Sales as a respondent.

Respondent filed its Consolidated Motion in Opposition to Complainant's Motion to File First Amended Complaint and Supplement to Amended Complaint on December 2, 2009 ("Opposition"). Complainant hereby files the following Reply to Respondent's Opposition ("Reply"):

I. Applicable Standard

As stated in Complainant's Motion, administrative pleadings are "liberally construed and easily amended." Port of Oakland and Great Lakes Dredge and Dock Company, 4 E.A.D. 170, 205 (EAB 1992) (quoting Yaffe Iron & Metal Co., Inc. v. U.S. EPA, 774 F.2d 1008, 1012 (10th Cir. 1985)). Motions to amend an administrative complaint are analyzed under the standard applied by the Federal Rules of Civil Procedure, which state: "[i]n the absence of ... undue delay, bad faith or dilatory motive on the part of the movant ... undue prejudice to the opposing party ... [or] futility of amendment," leave to amend pleadings should be allowed. Foman v. Davis, 371 U.S. 178, 181-182 (1962). See also In the Matter of Asbestos Specialists, 4 E.A.D. 819, 830 (EAB 1993); In the Matter of Wego Chem. & Mineral Corp., 4 E.A.D. 513, 525 n.11 (EAB 1993); In the Matter of Port of Oakland, 4 E.A.D. 170, 205 (EAB 1992).

Courts and Administrative Law Judges have consistently found that the most important factor is whether the amendment would unduly prejudice the opposing party. See, e.g., In the Matter of Carroll Oil Company, Docket No. 8-99-05, 10 E.A.D. 635, 2002 WL 1773052, at *10 (EAB, July 31, 2002). Undue prejudice occurs when the "prejudice outweighs the moving party's right to have the case decided on the merits. . . ." Prejudice weighing against granting a motion to amend may result from the "need for additional discovery, delayed litigation, or presentation of new legal theories shortly before trial, with attendant legal costs and burdens to the opposing party." In the Matter Of Zaclon, Inc., Zaclon LLC, and Independence Land Development

Company, Docket No. RCRA-05-2004-0019, 2006 WL 3406355, at *3 (EPA ALJ, April 21, 2006) (citing Carroll Oil, 2002 WL 1773052, at *10).

Most important to the points raised in the opposition, delay does not justify denial of a motion to amend a complaint to add individual defendants where discovery is not significantly affected or trial is not imminent. Banco Central de Paraguay v. Paraguay Humanitarian Foundation, Civ. No. 01-9649 (JFK)(FM), 2003 U.S. Dist. LEXIS 11584 (S.D. NY July 8, 2003) (no undue prejudice found where claims against individuals are the same as those against principal defendants, even where individuals need to retain counsel and take time to "get up to speed" in the case, where additional discovery may not be needed, and motion to amend was filed twenty months after original complaint); Randolph-Rand Corp. v. Tidy Handbags, Inc., Civ. No. 96-1829 (LMM)(DF), 2001 U.S. Dist. LEXIS 17625, * 12 (S. D. NY, Oct. 24, 2001) (no undue prejudice where proposed new claims against individuals, filed five years after the complaint, are identical to those against corporation, defendants did not show how amendment would materially affect the duration or scope of discovery, which was far from complete, no trial date had been set, and progress in the case was "halting at best").

II. Reply to Points Raised by Respondent in Its Opposition

A. Complainant Did Not Unduly Delay In Adding Flash Sales as a Party

In its Opposition, Respondent raises undue delay as a basis for denying Complainant's Motion and cites both *Carroll Oil* and *Zaclon*. Opposition at 3. However, both of these cases are distinguishable from the present case. In both of those cases, the motions to amend were filed relatively late in the proceeding and shortly before the scheduled hearings were to occur. In contrast, in the present case, Complainant's Motion was filed extremely early in the proceeding.[1]

[1] Complainant filed its Complaint on September 18, 2009, and Respondent filed its Answer on October 15,

In fact, to date, the Presiding Officer has not set a time for hearing or even a deadline for the submittal of prehearing exchanges.

In addition, Complainant is unaware of and Respondent has not articulated any harm or undue prejudice to it that would come from the granting of the Motion at this point in the proceeding. Indeed, the fact that Respondent itself identified Flash Sales as a liable party means that Respondent is fully aware of the facts pertaining to Flash Sales, and therefore could not show that it is prejudiced by new information or inclusion of a new party through the addition of Flash Sales to the proceeding.

Respondent's own discussion of the facts of *Carroll Oil* and *Zaclon* highlights the differences between those cases and the present case. For example, in regard to *Zaclon*, Respondent points out how "EPA did not attempt to add [the corporate officers as parties] to the complaint until six weeks before the scheduled hearing." Opposition, at 3. In *Carroll Oil*, Judge Moran, in denying Complainant's motion in *Carroll Oil*, found that The Region unduly waited until . . . the "eleventh hour" to file its Motion to Amend to add new parties. Carroll Oil, 2002 WL 1773052, *8-9. These facts are clearly distinct from the facts here, where Complainant has not waited until the "eve of trial" to file its Motion. As such, there is no reason why the Presiding Officer should not apply the liberal standard for allowing amendments to complaints.

Respondent also claims that because Complainant had knowledge about Flash Sales role prior to the filing of the Complaint, it was somehow bound to only naming Flash Sales as a

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2009. Complainant's Motion was filed on November 19, 2009, a mere two months after filing of the original Complaint[1] and only one month after filing of the Answer.

respondent in that Original Complaint. Opposition at 4. However, the correct analysis in an undue delay and prejudice analysis is the impact on the respondent in regard to delaying a trial or not providing ample time for the respondent to consider and respond to new legal issues, and not the basis of knowledge of Complainant at the time a complaint is filed. Even so, while Complainant had some information on "shipment" implicating Flash Sales prior to the filing of the Complaint, that information was limited to a return address on the package received by the agency with the pesticide products. In fact, it was not Respondent filed its Answer was filed that Complainant first understood Flash Sales' role in the sale and distribution of those illegal products.

B. Adding Flash Sales Would Not be Futile

Respondent additionally argues that the Motion to include Flash Sales would be futile because Complainant will not be able to prove that there is a relationship between Flash Sales and Bug Bam. Opposition at 4. Respondent clearly misapprehends FIFRA. FIFRA makes clear that any person in any way involved in the sale or distribution of an illegal pesticide product, including those who ship or distribute pesticide products such as Flash Sales and those that offer pesticide products for sale such as Bug Bam, are independently liable for the violation. See Section 12(a)(1)(A) of FIFRA; 40 C.F.R. § 152.3 (defining "distribute or sell," in part, as "the acts of *distributing*, . . . *offering for sale*, . . . [or] *shipping*. . ." a pesticide.). As Flash Sales and Bug Bam are each independently liable for the violations, the legal relationship between them is irrelevant, and therefore any failure to claim such a relationship does not lead to the Motion being futile.

Moreover, the very cases that Respondent cites show that the inclusion of Flash Sales is not futile. In those cases, Respondent concedes "that an amendment is not futile if a colorable basis for the amendment exists." In the Matter of Jerry Korn and Dairy Health, FIFRA 10-2000-0061, at 4 (EPA ALJ July 31, 2001); Zaclon, RCRA 05-2004-0019, at 6. Based upon the facts of the case and the legal test, the amendment should be allowed because there is more than a colorable basis for naming Flash Sales as a respondent.

C. Expanded Claims about the Minimum Risk Pesticide Exemptions Have Never Been Resolved

In opposing the part of the Motion seeking to amend the Complaint to include additional allegations pertaining to the application of the 25(f) exemption, Respondent simply opines how it meets those requirements, but provides no other basis for denying the Motion regarding these amendments. Opposition at 5-8. However, it is a well-settled principle that the burden of proving an exemption to a regulatory requirement, such as the 25(f) exemption, lies squarely upon the shoulders of a respondent. See In the Matter of Ashland Chemical Co., Division of Ashland Oil Inc., Docket No. RCRA-V-W-86-R-13, 1987 RCRA LEXIS 50 (Initial Decision, June 22, 1987); In the Matter of Steven Tuttle, Tuttle Tool Engineering and Tuttle Apiary Laboratories, Docket No. FIFRA 10-96-0012, 1997 WL 738081 (EPA ALJ, Sept. 30, 1997). Therefore, even if Complainant is not granted leave to amend the Complaint to include these allegations, Respondent will have the burden at hearing to demonstrate that it meets each and every one of the 25(f) exemption criteria. Complainant seeks to amend the Complaint to include these allegations merely to require Respondent to specifically admit or deny each of these

material facts pertaining to the exemption, as this will help to clarify and focus the areas of dispute for hearing by identifying the "genuine issues of material fact." See 40 C.F.R. § 22.21(a). As such, allowing the amendment for these allegations will result in better judicial economy by focusing the resources of the Presiding Officer forum and the parties only on those facts actually in dispute.

Respondent also makes reference to statements Complainant purportedly made during settlement discussions pertaining to the application of the 25(f) exemption. Opposition at 6. Without getting into what was said, Respondent is attempting to bring in statements that may have been made by Complainant during settlement discussions in violation of 40 C.F.R. § 22.22(a), which specifically states that evidence excluded under Federal Rules of Civil Procedure Rule 408 are also excluded in administrative proceeding governed under Part 22. Surely, any statements made by either party during settlement discussions about the application of the 25(f) exemption would clearly fall within the purviews of the protections of Section 408 of the Federal Rules, and therefore would not be admissible in this proceeding. All discussion in Respondent's Opposition referring to statements made during settlement conferences should be stricken from the record, and the Respondent should be admonished for having attempted to disclose these statements in violation of the Part 22 requirements.

D. The Supplement to the Motion Should Be Allowed to Conform the Penalty to the Facts and Circumstances of the Case

Respondent argues that Complainant should not be allowed to amend its penalty upwards because both the new and original proposed penalties do not "comport with the penalty

calculation policies set forth in the FIFRA Enforcement Response Policy." Opposition at 8. However, it is not until the hearing or any dispositive motions before the hearing where the Complainant will present its penalty case and the Respondent will have the chance to respond to it. Part 22 only requires that an administrative complaint, which simply initiates a proceeding, describe "all relief sought, including . . . the amount of the civil penalty which is proposed to be assessed, and a brief explanation of the proposed penalty." 40 C.F.R. § 22.14(a)(4). It is not until the prehearing exchange that Complainant is first required to explain "how the proposed penalty was calculated in accordance with any criteria set forth in the Act" and a respondent is allowed to explain "why the proposed penalty should be reduced or eliminated." 40 C.F.R. § 22.19(a)(3). As such, as with the 25(f) exemption, respondent is prematurely making its arguments against the validity of the proposed penalty. As Respondent will have ample opportunity in the prehearing exchange and later at hearing to marshal its arguments against the proposed penalty, it will not be prejudiced by the allowance of the new proposed penalty at this point. As Respondent has failed to raise a valid reason why the Presiding Officer should not allow Complainant to revise upwards the proposed penalties in the Complaint, to the extent the Presiding Officer allows the addition of Flash Sales, she should also allow the penalty to be adjusted upwards to reflect the new party.

III. Conclusion

For the reasons set forth herein and in the Motion, the Complainant hereby moves the Presiding Officer to grant it leave to file and serve upon the respondents Bug Bam and Flash Sales the First Amended Complaint attached to the Motion pursuant to 40 C.F.R. § 22.14(c).

Respectfully submitted,

DATED: 12/10/09

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In the Matter of Bug Bam Products, LLC
Docket No. FIFRA-09-2009-0013

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Reply To Consolidated Motion In Opposition To Complainant's Motion To File First Amended Complaint And Supplement To Amended Complaint was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, and that a copy was faxed and sent by Pouch Mail and first class certified return receipt mail, respectively, to:

The Honorable Barbara A. Gunning
Administrative Law Judge
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12/10/09
Date

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